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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1930

NO. 195

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

Appellant,

VS.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Appellee.

Motion to Affirm State Court Decision and Dismiss Appeal and Brief of Appellee in Suport of Motion.

GEORGE BUTLER,
J. ED. FRANKLIN,
LAMAR F. EASTERLING,
SIMON ROSENTHAL,
C. B. SNOW,
Attorneys for Appellee.

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W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Appellee.

Motion to Affirm State Court Decision and Dismiss Appeal.

Comes now W. J. Miller, State Tax Collector, for the use of the Mississippi Levee District, appellee in the above entitled cause, by his counsel of record, and moves the Court to affirm the decision of the Supreme Court of the State of Mississippi and dismiss the appeal herein, as the appeal presents no question on which the decision of the case depends. The validity of Section 1, Chapter 282, Laws of Mississippi of 1914, is not necessary to a final decision herein.

Respectfully submitted,

GEORGE BUTLER,
J. ED. FRANKLIN,
LAMAR F. EASTERLING,
SIMON ROSENTHAL,
C. B. SNOW,
Attorneys for Appellee.

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VS.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Appellee.

Brief of Appellee in Support of Motion to Affirm State Court Decision and Dismiss Appeal.

The Supreme Court of the State of Mississippi affirmed the judgment of the Circuit Court of Montgomery County, Mississippi, by decree entered April 21, 1930. From this decree the Columbus & Greenville Railway Company and the sureties on its appeal bond in the state court have prosecuted a direct appeal to the Supreme Court of the United States and have also filed a petition for writ of certiorari.

The Supreme Court of the State of Mississippi held the following provision:

"* * * * * Provided further that the tax per mile per annum on the main line of any railroad

company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be $50.00 per annum."

of Section 1, Chapter 259, Mississippi Laws of 1926, to violate the 14th Amendment of the Federal Constitution.

It upheld as valid the remainder of Section 1, Chapter 259, Mississippi Laws of 1926, and assessed the Columbus & Greenville Railway Company with a tax of $350.00 per mile.

Section 1, Chapter 259, Mississippi Laws of 1926, is as follows:

> "That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the Board of Mississippi Levee Commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard guage railroads, not including side-tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow guage railroad or railroads of less than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder or a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or

branch railroad shall be subject to taxation, under this act while the same is in process of construction, but if any part hereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished; *provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be* $50.00 *per annum.*" (Italics ours.)

The part of the law in italics is the proviso declared unconstitutional. The Act of 1926 amends Section 1, Chapter 282, Mississippi Laws of 1914. By omitting the part of the Act of 1926 shown in italics, we have the text of the Act of 1914.

The direct appeal prosecuted by the Columbus & Greenville Railway Company herein is for the purpose of having Section 1, Chapter 282, Mississippi Laws of 1914, declared null and void as violative of the Constitution of the United States.

Appellants have filed a brief in support of their petition for writ of certiorari and we have replied to said brief. The appellants have filed a reply to our brief. Said briefs in our opinion cover in full the law on this matter and we respectfully refer the Court to the briefs already on file.

We quote the part of the opinion of the state court dealing with the matters upon which a direct appeal is based:

"(1) Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads having

not more than 25 miles of railroad in the levee district; and, second, all other railroads therein. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory. It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same; that is, $350 per annum on each mile of its railroad in the levee district.

* * * * * * *

"In the event a railroad discriminated against by this statute should challenge the validity thereof on the ground that it is arbitrarily discrimniated against, it would not be necessary for the court to decide the question, for to do would profit the complaining railroad nothing; for, if the statute should be held void, chapter 282, Laws of 1914, would remain in full force and effect, under which the complaining railroad's tax would be $350 per mile, the exact amount imposed by chapter 259, Laws of 1926; or, if the priviso only of chapter 259, Laws of 1926, is void, the same result would follow. This rule seems not to have been called to the attention of this court, and was overlooked by it, in the case of *City of Jackson v. Mississippi Fire Insurance Co.*, 132 Miss. 415, 96 So. 345."

The appeal in this matter is apparently based upon the fourth assignment of error, as shown at page 64 of the record, which is as follows:

> "(4) The Supreme Court of the State of Mississippi committed error in holding that Chapter 282 of the Mississippi Laws of 1914 was valid over and against the objections of the Columbus & Greenville Railway (Railroad) Company that said Chapter 282, Mississippi Laws of 1914, as applied and enforced in this case, violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the said Columbus & Greenville Railway (Railroad) Company of its property without due process of law and denied to it the equal protection of the law."

We are unable to gather from the statement of jurisdiction filed by the appellee just what the appeal is based upon. However, we gather that they have taken a direct appeal on the ground that the court reinstated the Act of 1914. See page 7 of the statement. With the exception of the validity of the Act of 1914, all questions involved in this case are presented by the petition for writ of certiorari.

We have discussed the matters herein presented, as above stated, in our brief filed in answer to the petition for writ of certiorari, and we insert in the appendix herein that portion of the brief dealing with the question now presented.

We can adopt the brief of the appellant filed in this cause in support of its petition for writ of certiorari as a

brief in support of this motion. If the authorities cited in said brief can support the full text of the Act of 1926, then even more strongly can they be cited to support the Act of 1914 and the Act of 1926, without the proviso as to railroads less than 25 miles in length.

We respectfully submit that the judgment of the Supreme Court of the State of Mississippi in this matter should be affirmed and the appeal of the Columbus & Greenville Railway Company, et al., to this Court should be dismissed and the appellants assessed with damages as provided by the rules of this Court.

Respectfully submitted,

GEORGE BUTLER,
J. ED. FRANKLIN,
LAMAR F. EASTERLING,
SIMON ROSENTHAL,
C. B. SNOW,
Attorneys for Appellee.

APPENDIX

"Judgment Based Upon Act of 1926. Same Statute May Be Constitutional in Part and Unconstitutional in Part

The inconsistency of the petitioner's position in this case is glaring. Petitioner comes here by petition for writ of certiorari for the purpose of sustaining the validity of Section 1, Chapter 259, Laws of 1926. In the same case, petitioner has prosecuted a direct appeal for the purpose of having Section 1, Chapter 282, Laws of 1914, declared unconstitutional. Yet, as heretofore stated (page 6) the law of 1926 is identical with the law of 1914, except for the proviso which exempts from its provisions a railroad whose main line is less than twenty-five miles in length in the district from the $350.00 tax per mile and places a special tax of $50.00 per mile thereon.

How counsel can maintain that the classification contained in the Act of 1914 is unconstitutional and at the same time maintain that the classification in the Act of 1926 is constitutional is beyond our understanding.

We again call the Court's attention to another inaccurate statement contained in the brief for petitioner (paragraph 2, page 10, paragraph 4, page 17, and page 20) wherein it is asserted that the Supreme Court of the State of Mississippi declared the entire Act of 1926 null and void and reinstated the Act of 1914. With the proviso complained of stricken out, the Act of 1926, as hereinbefore stated, became and was in fact the Act of 1914, and the Mississippi Supreme Court therefore held.

"* * * It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellant will have to pay will be the same; that is, $350.00 per annum on each mile of its railroad in the levee district.

"For, if the statute should be held void, chapter 282, Laws of 1914, would remain in full force and effect, under which the complaining railroad's tax would be $350 per mile, the exact amount imposed by chapter 259, Laws of 1926; or, if the proviso only of chapter 259, Laws of 1926, is void, the same result would follow."

It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that part which is unconstitutional may be stricken out and rejected and the valid part of the statute retained.

6 *R. C. L.* 121.

Allen vs. Louisiana, 103 U. S. 80, L. ed. 318.

Adams vs. Standard Oil Co., 97 Miss. 879, 53 So. 692.

Ballard vs. Miss. Cotton Oil Co., 81 Miss. 507, 34 So. 533, 95 A. S. R. 476.

6 R. C. L. 121.

"It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part, and that if the invalid part is severable from the rest the portion which is

constitutional may stand while that which is unconstitutional is stricken out and rejected; but where it is not possible to separate that which is unconstitutional from the rest of the act, then the whole statute falls. If after eliminating the invalid portions, the remaining provisions are sufficent to be operative and accomplish their proper purpose, it does not necessarily follow that the whole act is void. The constitutional and unconstitutional parts should be severable so that the valid portion may be read and may stand by itself. In determining the question whether the parts of a statute are severable within the meaning of this principle, the court acts by inspection of the statute. The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable, so that some stand while others fall." 6 R. C. L. 121.

Allen vs. Louisiana, 103 U. S. 80.

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.

* * * * * * *

Adams vs. Standard Oil Co., 97 Miss. 879, 53 So. 692.

"In treating this question, Judge Cooley, in his work on Constitutional Limitations (7th Ed.) pp. 246, 247, 248, says: 'Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so

connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance'. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."